SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 191

NATURAL GAS PIPELINE COMPANY OF AMERICA,
Appellant,

vs.

PANOMA CORPORATION AND THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA,
Appellees.

No. 321

NATURAL GAS PIPELINE COMPANY OF AMERICA,
Appellant,

vs.

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, ET AL.,
Appellees.

JOINT BRIEF OF APPELLANT.

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JOINT BRIEF OF APPELLANT.

Foreword.

The two cases covered by this brief present, in large part, identical legal questions arising out of successive orders of the Corporation Commission of Oklahoma (hereafter referred to as "state commission") involving minimum prices for the sale of gas by Panoma Corporation to appellant Natural Gas Pipeline Company of America (hereafter referred to as "Natural"). Both orders were

affirmed by the Supreme Court of Oklahoma, the later decision (in No. 321) specifically relying upon the former. The state commission is an appellee in both cases.

After this Court on appeal had noted probable jurisdiction, both cases were assigned for argument, one immediately following the other. In order to avoid duplication of statement and argument, appellant files this brief covering both appeals.

OPINIONS BELOW.

The opinions of the Supreme Court of Oklahoma have not been officially reported. Its opinion in No. 191 is unofficially reported at 271 P. 2d 354 and in No. 321 at 272 P. 2d 425. These opinions appear, respectively at 191R. 149 and 321R. 165.[1] In each case four of the nine members of the state court dissented with written opinion.

JURISDICTION.

The final judgment of the Supreme Court of Oklahoma in No. 191 was entered on March 23, 1954. (191R. 173) On June 15, 1954, the Chief Justice of that court signed an order allowing the appeal to this Court. (191R. 174) The appeal was docketed on July 6, 1954.

The final judgment of the Supreme Court of Oklahoma in No. 321 was entered on July 13, 1954 (321R. 198) and notice of appeal to this Court was filed with the Clerk of the Supreme Court of Oklahoma on August 7, 1954. (321R. 199) The appeal was docketed in this Court on September 1, 1954.

By orders entered November 8, 1954, this Court noted probable jurisdiction. (191R. 183; 321R. 285) The juris-

[1] The record in No. 191 will be referred to as (191R.....) and the record in No. 321 as (321R. ....). Emphasis is supplied throughout this brief unless otherwise noted.

diction of this Court to review these judgments on appeal is conferred by Title 28, United States Code, Section 1257(2).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

These cases both involve the Commerce Clause of the Federal Constitution, Art. I, Sec. 8, Cl. 3, and the Natural Gas Act, 15 U. S. C. § 717 *et seq.* The appeal in No. 191 also involves the Equal Protection Clause of the Fourteenth Amendment. Pertinent provisions of the Constitution and statute are set out in Appendix A hereto. The state statute involved in No. 191, as that term is used in Title 28 U. S. C. Section 1257(2), is the order of the state commission numbered 24,745. (191R. 81) The state statute involved in No. 321 is the order of the state commission numbered 26,096. (321R. 132)

QUESTIONS PRESENTED.

1. Whether the Corporation Commission of Oklahoma has the power, consistently with the Commerce Clause of the Constitution of the United States (Art. I, Sec. 8, Cl. 3) and the Natural Gas Act (15 U. S. C. 717 *et seq.*) to fix the minimum price of residue gas sold at the outlet of Panoma Corporation's gasoline plant to Natural, an interstate pipeline company, for immediate transportation interstate.

2. In cause No. 191, whether the Corporation Commission of Oklahoma has the power, consistently with the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States (Amendment XIV, Sec. 1), to apply its minimum price order in such a way as to require appellant to pay Panoma Corporation substantially higher amounts for residue gas than other inter-

state pipeline companies were required to pay their suppliers at the same time under identical circumstances.

STATEMENT.

No. 191.

Appellant Natural Gas Pipeline Company of America is a natural gas company as defined in the Natural Gas Act, 15 U. S. C. § 717 *et seq.*, and operates an interstate gas pipeline transportation system under certificates of convenience and necessity issued by the Federal Power Commission. Natural's pipeline system extends from a point near Gray, Oklahoma to the vicinity of Joliet, Illinois, with a trunk lateral line traversing northern Illinois. By means of this system it transports and delivers natural gas for consumption in the Chicago metropolitan area and other localities. (191R. 98)

On December 1, 1946, Natural entered into a contract with the partnership of Harrington & Marsh, owners of mineral rights covering in excess of 78,000 acres of land in Texas County, Oklahoma, for the purchase of specified amounts of natural gas from wells to be drilled by the partnership on this land. (191R. 98-125) The contract provided that Harrington & Marsh were to produce the gas, construct and operate gathering lines from the wells to a central point, and there construct and operate a gasoline plant to extract the liquids from the raw natural gas. (191R. 100)[2]

[2] For mutual operating convenience, Natural agreed to construct and operate a compressor station at the inlet side of Harrington & Marsh's gasoline plant. Natural received temporary custody of the gas at that point but, immediately upon compression of the gas, it was redelivered to sellers for extraction of liquids. (191R. 101, 103) This was the same operating practice as that involved in the sale by Phillips Petroleum Company to Panhandle Eastern Pipe Line Company involved in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672. (321R. 218-9, 284)

The contract further provided that, following the extraction by Harrington & Marsh of the liquefiable hydrocarbons, the residue constituent of the natural gas would be delivered to Natural near the outlet of the gasoline plant, at which point title to that part of the gas would pass to Natural. (191R. 103) The price to be paid by Natural to Harrington & Marsh for the residue gas was fixed in the contract at 6 cents per Mcf until 1951, with increased amounts provided thereafter. (191R. 106)[3]

Pursuant to this contract Panoma Corporation, which succeeded to the properties of Harrington & Marsh (191R. 24), began deliveries of residue gas to Natural in August of 1948. (191R. 25) As contemplated by the contract, Panoma thereafter produced, gathered and processed the natural gas for the extraction of the liquid hydrocarbons, after which it sold the residue to Natural near the outlet of its gasoline plant at the prices set forth in the contract.

Meanwhile, effective January 1, 1947, the state commission by its order No. 19514 fixed a minimum wellhead price for gas produced in the Guymon-Hugoton field of Oklahoma, the gas field here involved. That order directed:

> "That no natural gas shall be taken out of the producing structures or formations in the Guymon-Hugoton field in Texas County, Oklahoma, *at at price, at the wellhead,* of less than 7¢ per thousand cubic feet of natural gas measured at a pressure of 14.65 pounds absolute pressure per square inch." (191R. 134)

The validity of this order as applied to sales of raw natural gas at the wellhead, prior to gathering and processing, was upheld by the Supreme Court of Oklahoma and by this Court on appeal in *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179.

[3] The contract price was computed on a pressure base of 16.4 pounds per square inch. Subsequently the state commission set 14.65 pounds per square inch as a standard pressure for measurement, and on this basis the initial contract price was 5.12 cents per Mcf, and not 6 cents. (191R. 25)

Thereafter, until January of 1951, Panoma continued to submit its invoices, and Natural continued to pay for the residue gas purchased from Panoma, on the basis of the contract prices. During that month, however, Panoma "revised the method of preparation of invoices" to assert an obligation on Natural to pay for residue gas the increased price fixed by the 7 cent minimum price order of the state commission applicable to sales of raw natural gas at the wellhead. (191R. 44) And on January 30 it filed an application with the state commission to require Natural to pay such increased prices. (191R. 11-12)

After a hearing, the state commission sustained Panoma's claims. (191R. 81-87) It found that Panoma's sales to Natural were comprehended by its original wellhead order and that Panoma was not realizing the equivalent of 7 cents per Mcf from its sales, even though the price paid by Natural for residue gas (5.12 cents) plus Panoma's receipts from the sale of liquid hydrocarbons extracted from the gas (4.18 cents) resulted in a gross return of 9.30 cents per Mcf.[4] Natural was then ordered to increase its payments to 7 cents per Mcf, the equivalent of the minimum wellhead price for raw natural gas, without consideration of Panoma's receipts from liquid hydrocarbons extracted therefrom. In addition, Natural was ordered to pay Panoma the difference between the contract price and the increased price thus fixed by the state commission retroactively to the date deliveries had begun. (191R. 86) Unless that payment was made within 20 days—a sum of more than $1,300,000—Panoma was directed to cease deliveries to Natural.

[4] The state commission had previously found that Phillips Petroleum Company was complying with the basic order by realizing approximately 7 cents per Mcf from the sale of residue and liquid constituents combined. The discrimination resulting from this difference in treatment will be discussed *infra* at pp. 35 to 38.

Upon appeal, the Supreme Court of Oklahoma sustained the state commission's order, four justices dissenting. (191R. 151-169) Following denial of Natural's petition for rehearing, its appeal to this Court was perfected.

No. 321.

Insofar as the physical details of production, gathering, processing and delivery of gas and the pertinent gas purchase contract are concerned, the facts involved in No. 321 are identical with those in No. 191. See Stipulation (321R. 126-128) and gas purchase contract. (321R. 247)

The state commission order involved in No. 321 grew out of an application filed by a group of royalty owners with the state commission on January 3, 1952, in which they sought an order of the commission increasing the minimum wellhead price in the Guymon-Hugoton field from 7 cents to 9.8262 cents per Mcf. (321R. 9-10) They also asked that the state commission's order be so couched as to

> "* * * clearly establish the right and duty of each producer to receive, and the obligation of each purchaser to pay, the established wellhead price for gas without deductions for the use or earnings of facilities and plants for handling or working such gas after it leaves the wellhead; * * *" (321R. 10)

In short, the state commission was asked both to increase the minimum wellhead price and to apply generally the result reached by its order in No. 191, that pipeline companies which purchase residue gas away from the wellhead must pay the equivalent of the wellhead price for the residue constituent alone, without consideration of the value of the gasoline and other liquids retained by the producer-processor.

In addition to Natural, Michigan-Wisconsin Pipe Line

Company, appellant in No. 320 in this Court and Panhandle Eastern Pipe Line Company, appellant in No. 322, were parties to the proceeding before the state commission, as was Phillips Petroleum Company, a principal supplier of gas to Michigan-Wisconsin and Panhandle. Following a hearing, the state commission, on July 29, 1952, entered its order No. 26,096 (321R. 132-137) in which it (a) increased the minimum price for natural gas sold at the wellhead from 7 cents per Mcf, as provided in its order of January 1, 1947, to 9.8262 cents per Mcf, the exact price requested by the royalty owners in their application; (b) fixed a minimum price of 9.8262 cents per Mcf plus the reasonable cost of gathering for gas sold, without processing, at points remote from the well; and (c) fixed a minimum price of 9.8262 cents per Mcf for residue gas sold after gathering and processing for the extraction of gasoline and other liquefiable hydrocarbons.

Natural purchases only residue gas in Oklahoma. It was therefore affected by the third provision noted above, which read:

> "If the gas is processed for extraction of liquid hydrocarbons and sold during or at the conclusion of gathering, the price for the residue gas shall be not less than 9.8262¢ per thousand cubic feet." (321R. 137)

Upon appeal, the Supreme Court of Oklahoma affirmed the state commission's order, four justices again dissenting. (321R. 165-188)[5] Following the state court's denial of petitions for rehearing filed by Natural, Michigan-Wisconsin and Panhandle (321R. 198), their appeals to this Court were perfected.

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[5] One of the five justices of the majority concurred only by reason of *stare decisis* (321R. 178), although he had dissented from the court's prior decision in No. 191. (191R. 164) Thus, a majority of the state court actually disapproved the result reached in No. 321.

SUMMARY OF ARGUMENT.

1. The orders of the state commission here involved, which attempt to set a minimum price at which residue gas may be sold by an independent producer to an interstate pipeline company after completion of gathering and processing, are an unconstitutional invasion by the State of an area of exclusive federal jurisdiction. This is demonstrated by the following considerations:

(a) This Court, in *Phillips Petroleum Company* v. *Wisconsin*, 347 U. S. 672, held that independent producers like Panoma are "natural gas companies" within the meaning of the Natural Gas Act, 15 U. S. C. § 717 *et seq.*, and that sales of the very kind here involved are subject to the jurisdiction of the Federal Power Commission. As appellees themselves argued before this Court in the *Phillips* case, attempted regulation of the same sales by state and federal agencies results in a basic conflict of authority. In any such case, attempted regulation by the state must fail.

(b) In view of the great national interest in the free flow of natural gas to markets throughout the country, attempted state regulation of sales at the very mouth of an interstate pipeline contravenes the Commerce Clause of the Constitution of the United States. No further processing remains to be done; no further gathering or assembling lies ahead. State-fixed minimum prices exacted at this stage of the interstate movement are passed on directly to the consumers of gas in other states. This Court has uniformly held that, under circumstances of this kind, attempted state regulation of sales made in interstate commerce cannot stand. This is particularly true where, as here, state regulation may readily be made the vehicle for

local preferences to the detriment of citizens of other states.

2. The state commission's orders fixing a minimum price for the sale of natural gas are specifically aimed at, and discriminate against interstate commerce, and for that additional reason contravene the Commerce Clause. The only gas field for which the state commission has fixed minimum prices is the Guymon-Hugoton field, from which 89% of the gas is transported to other states and only 11% consumed within Oklahoma. On the other hand, in the remaining gas fields of Oklahoma, from which over 85% of the gas is consumed within Oklahoma and less than 15% transported to other states, the state commission has not prescribed minimum prices even though that gas is in many cases sold at prices far lower than those prevailing in the Guymon-Hugoton field. The state commission's action thus represents a studied attempt to increase the price of gas sold interstate while permitting the maintenance of contract prices with respect to gas consumed in Oklahoma. This obvious discrimination against interstate commerce voids the state commission's orders under the Commerce Clause.

3. The state commission interpreted its original 7 cent minimum wellhead price order as having been complied with by Phillips Petroleum Company by reason of the fact that that company received a gross price of approximately 7 cents per Mcf from the sale of the residue and liquid components of the gas combined. In the case of Panoma, on the other hand, the state commission in interpreting the same order held that receipts from the residue constituent of the gas alone must equal 7 cents per Mcf., without consideration of the proven substantial value of the liquid constituents, and directed Natural to increase its payments for residue gas to 7 cents. This acknowledged discrimination among companies purchasing gas at the same time and

under identical conditions results in a denial of that equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT.

I.

THE STATE COMMISSION'S ATTEMPT TO FIX THE PRICE AT WHICH NATURAL PURCHASES RESIDUE GAS FROM PANOMA INVADES A FIELD OF EXCLUSIVE FEDERAL CONTROL.

The transaction over which the Corporation Commission of Oklahoma has attempted to assert control by the orders here involved is of a type very familiar to this Court, namely, the sale of residue gas by an independent producer of natural gas to an interstate pipeline company. Panoma Corporation,[6] like Phillips Petroleum Company, produces natural gas from numerous wells located on land which it owns or controls, gathers the gas to a central point through an intricate network of gathering lines, processes the gas in a gasoline plant, where gasoline and other liquid hydrocarbons are extracted, and finally, after such processing has been completed, sells and delivers the residue constituent to the interstate pipeline. From the point of sale to the pipeline company, the gas travels immediately and without interruption to its markets in other states.

Thus, the physical and contractual situation with which this Court was concerned last term in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157 and *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, is again presented. Indeed, the order of the state commission involved in No. 321 applies equally to the very transactions between Phil-

[6] After the record was closed in the two cases before the Court, Panoma Corporation's properties were sold to Dorchester Corporation, which now operates the properties.

lips and Michigan-Wisconsin and Panhandle, that were before the Court in those cases.

In view of the factual identity of the present cases with those just cited, it may not be denied that Panoma's sales to Natural were sales in interstate commerce and that the State of Oklahoma could not constitutionally tax those sales or the coincident "taking" of gas by Natural for immediate interstate transportation. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, 167. Nor may it be denied that Panoma was a "natural gas company" within the meaning of the Natural Gas Act, 15 U. S. C. § 717 *et seq.*, and that its sales to Natural, another "natural gas company," were subject to regulation by the Federal Power Commission. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672.

Pursuant to the decision last cited, the Federal Power Commission has adopted extensive regulations applicable to independent producers, relating to the filing of applications for certificates of convenience and necessity, the filing of gas sale contracts and many other details.[7] And during January of this year, the Commission held comprehensive hearings relating to the principles by which rates should be fixed for sales of gas by independent producers to interstate pipeline companies.[8] Indeed, Panoma's successor, Dorchester Corporation, has already applied to the Federal Power Commission for authority to increase its rates to Natural to 10 cents per Mcf., an amount substantially in excess of the contract price.[9]

[7] See 19 Fed. Reg. 8807.

[8] Federal Power Commission Docket No. R-142, "Consideration of Principles and Methods to be Applied in the Fixing of Rates to be Charged by Independent Producers for Natural Gas Sold in Interstate Commerce for Resale."

[9] See order of the Federal Power Commission in Docket No. G-6505, *In the Matter of Dorchester Corporation*, issued December 29, 1954, 20 Fed. Reg. 143.

The question necessarily presented by these appeals, therefore, is whether a state agency may constitutionally fix the minimum price at which one natural gas company may sell gas in interstate commerce to another natural gas company when the prices to be paid on such sales are also subject to the jurisdiction of the Federal Power Commission. But the very statement of the contention that both state and federal regulatory bodies have power to fix the price of a single sale reveals an inherent contradiction. As the Corporation Commission of Oklahoma itself pointed out in its brief to the Federal Power Commission in the *Phillips* case:

> "To repeat, two agencies cannot exercise jurisdiction and authority over the same producers and gatherers with respect to the same sales of gas without there being a basic conflict of jurisdiction and authority." (Brief of Corporation Commission of Oklahoma before the Federal Power Commission in Docket No. G-1148, filed June 25, 1951, p. 19.)

While no extended argument of the point seems necessary in view of the position thus taken by the appellee state commission, appellant believes it appropriate to point out the following additional considerations:

A. This Court Has Already Held That the Sales Here Involved Are Within the Exclusive Jurisdiction of the Federal Power Commission.

The question whether a state agency has power to fix minimum prices for the interstate sale of gas by an independent producer to a pipeline company was specifically decided in the *Phillips* case. The Court will recall that, in addition to the briefs and arguments submitted by Phillips and the Federal Power Commission, a 45 page brief was submitted by the Corporation Commission of Oklahoma and the regulatory commissions of Texas and New Mexico.

In those briefs it was argued, on the basis of certain language in *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, that the Natural Gas Act should not be construed as applying to sales of the kind here involved because Federal Power Commission jurisdiction of such sales would conflict with and render nugatory some of the regulatory measures of the producing states including, specifically, Oklahoma's minimum price regulations. Thus, at page 18 of their brief in this Court those states said:

> "The conflict with state authority in those instances where such minimum prices are fixed is obvious."

Answering this argument and that of Phillips to the same effect, this Court said:

> "The *Interstate* case is also said to be distinguishable in that it did not involve an asserted conflict with state regulation, and federal control was not opposed by the state authorities, while in the instant cases there are said to be conflicting state regulations, and federal jurisdiction is vigorously opposed by the producing states. The short answer to this contention is that the jurisdiction of the Federal Power Commission was not intended to vary from state to state, depending upon the degree of state regulation and of state opposition to federal control. We expressly rejected any implication to the contrary, in the *Interstate* case." 347 U. S. at 681.

In order to give any effect to the state commission's order, appellees must now argue that, with respect to interstate sales of gas in Oklahoma, the Federal Power Commission is either ousted of jurisdiction entirely or is bound to give effect to the state minimum price in setting the rates of independent producers, whereas its powers are subject to no such limitation in respect of sales in states having no such regulations. But any such argument would be quite contrary to this Court's specific holding that Federal Power Commission jurisdiction "was not intended to

vary from state to state, depending upon the degree of state regulation."

The very reason why Oklahoma participated so actively in the *Phillips* case was that, as it acknowledged, Oklahoma's minimum price regulations were entirely inconsistent with federal jurisdiction over the sales in question. The state commission is hardly in a position now to contend that this Court's decision was made without consideration of its effect upon conflicting state regulations. In short, the precise question now before this Court was actually presented to and necessarily decided by the Court in the *Phillips* case. This, obviously, is also appellees' view, for the principal point in the petition for rehearing submitted this term by the State of Oklahoma in the *Phillips* case was entitled:

> "Contrary to the expressed intent of Congress, the Court's decision pre-empts for federal regulation an entire field heretofore exclusively occupied by the States." (Petition for Rehearing of the States of Texas, Oklahoma and New Mexico in No. 281, 1953 Term, *Texas et al.* v. *Wisconsin et al.*, p. 6.)[10]

B. State Minimum Price Regulations Are Inconsistent With Federal Jurisdiction Over Interstate Sales of Gas for Resale.

While appellees have thus conceded that, under this Court's decision in the *Phillips* case, federal regulation

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[10] Appellee Phillips Petroleum Company similarly construes this Court's opinion. In its petition for rehearing in the *Phillips* case, Phillips stated (pp. 16-17):

> "The decision gives the Federal Power Commission wide authority in an area which for decades has been occupied solely by state power. It does so in terms which suggest that within this area federal power is to be paramount and exclusive: * * *
>
> * * * * * *
>
> "Federal regulation of field prices of natural gas will necessarily conflict with state regulation of the same prices. * * *"

of the rates at which independent producers sell gas to interstate pipeline companies is "paramount and exclusive", this fact is, in any event, clearly demonstrable.

As this Court has often pointed out, it was the intention of Congress in enacting the Natural Gas Act to fill the "gap" caused by this Court's decisions that, with respect to wholesale sales of gas in interstate commerce, the Commerce Clause precludes state regulation. *Missouri* v. *Kansas Natural Gas Co.*, 265 U. S. 298; *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83. The congressional committee reports accompanying the bill reveal that:

> "* * * The basic purpose of the present litigation is to *occupy this field* in which the Supreme Court has held that the States may not act." (H. R. Rep. No. 709, 75th Cong. 1st Sess.)

Since "occupation of the field" is a term of art signifying exclusive federal control of the subject matter, see *e. g. Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605, 613, the intent of Congress is unmistakable.

Shortly after enactment of the Natural Gas Act, moreover, the question was presented whether a state regulatory commission could regulate the rates at which a natural gas company sells gas to a distribution company for resale. In *Public Utilities Commission* v. *United Fuel Gas Co.*, 317 U. S. 456, 468, this Court held that "The power to fix rates for natural gas transported and sold in interstate commerce has been intrusted solely to the Federal Power Commission." Pointing out the essential conflict between state and federal regulation of the same rates, the Court stated:

> "And as to rates effective in the future we agree with the District Court that the Natural Gas Act of 1938 governs. Congress by that Act * * * preempted the regulatory powers over the transportation and sale

of natural gas in interstate commerce." 317 U. S. at 466.[11]

The conflict which this Court found inherent in concurrent state and federal regulation of the same rates at the terminus of an interstate pipeline is repeated—even intensified—by attempted state regulation of sales by one natural gas company to another at the mouth of such a pipeline. Section 4(a) of the Natural Gas Act requires that rates and charges for the sale of natural gas by a natural gas company "shall be just and reasonable." Rates and charges must be filed with the Federal Power Commission, § 4(c), and may not be changed without notice to the Commission and the public. § 4(d). The Commission may inquire into the legality of rates and charges of companies subject to its jurisdiction, and if it finds after a hearing that the rates or charges are unreasonable, "the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order." § 5(a). Furthermore, no natural gas company may abandon any part of its service without first having obtained the approval of the Commission upon a finding that the present or future public convenience and necessity permit such abandonment. § 7(b).

The scope and character of these provisions indicates the untenability of attempted state regulation of the same transaction. Suppose that the Federal Power Commission should find that the present Oklahoma minimum price of

[11] This Court also said in the *United States Fuel Co.* case: "It is clear, as the legislative history of the Act amply demonstrates, that Congress meant to create a comprehensive scheme of regulation which would be complementary in its operation to that of the states, without any confusion of functions. The Federal Power Commission would exercise jurisdiction over matters in interstate and foreign commerce, *to the extent defined in the Act*, and local matters would be left to the state regulatory bodies." 317 U. S. at 467.

9.8262 cents per Mcf. is not "just and reasonable" and orders Dorchester to charge no more than the contract price. Dorchester will then be subject to a state commission order that it shall not produce gas for sale to Natural at less than 9.8262 cents and, at the same time, subject to the order of the Federal Power Commission that it shall charge no more than 5.12 cents and that it may not abandon deliveries.

As appellee Phillips Petroleum Company well stated in its brief to the Federal Power Commission: "Surely it will not be contended that each authority would have to confer with the other and agree upon prices which would not interfere one with the other! Such an idea is in direct conflict with all that has been said by the Supreme Court concerning the respective powers of the Federal Power Commission and the states"[12]

The question whether there is any present conflict between rates fixed by the Federal Power Commission and the Oklahoma minimum price of 9.8262 cents per Mcf. is irrelevant. The scope of jurisdiction of the Federal Power Commission surely does not depend upon the measure of the rate which it fixes. Thus, it is no answer to say that if the state sets an 8 cent minimum price and the Federal Power Commission sets a 9 cent rate there is no conflict of jurisdiction. If, as a result of the actions of either agency, their orders *may* come into conflict, state regulation must necessarily fail.

This Court recently had occasion to apply this principle. In *United States* v. *Public Utilities Commission*, 345 U. S. 295, where, as here, a state regulatory agency and the Federal Power Commission both asserted jurisdiction over the same sale, it was argued that because the state agency's

[12] Brief of Phillips Petroleum Company before the Federal Power Commission in Docket No. G-1148, filed June 22, 1951, p. 104.

order merely permitted, but did not require, higher rates this Court should await actual conflict before passing upon the question of the jurisdiction of the respective agencies. But this Court said:

> "The distinction, whatever its abstract attraction, misses the point that we are here considering whether or not the state agency had jurisdiction at the outset to consider these rates at all. That the order would have no concrete effect on the prices petitioners must pay is irrelevant and unlikely as well." 345 U. S. at 298-9 (footnote 1).

See also, *e. g., Northern Pacific Ry. Co.* v. *Washington*, 222 U. S. 370, 378; *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605, 613. Here, it should be added, that conclusion follows *a fortiori*, since the state orders are not merely permissive but affirmatively require payment of the increased price.

It may be pointed out, moreover, that actual conflict between state minimum price orders and Federal Power Commission jurisdiction has already arisen and been resolved contrary to the assertion of power by the state. *State Corporation Commission of Kansas* v. *Federal Power Commission*, 206 F. 2d 690 (8th Cir.), involved an appeal from a decision of the Federal Power Commission fixing the rates of Northern Natural Gas Company. That company, in addition to operating an interstate pipeline, produces some of its own gas. As to such gas the company sought in its rate application to attribute the value of 8 cents per Mcf., the minimum price set by the Kansas state commission. But in determining Northern Natural's cost of service the Federal Power Commission refused to recognize the state minimum price which, it said, would "add a fictitious $1,914,574 to Northern's actual cost of service." 206 F. 2d at 703.

The Court of Appeals upheld the Commission's refusal

to allow the state minimum price. With respect to this question the court said:

> "We think the argument here that the Commission is bound to give effect to the 8 cent valuation made in Kansas * * * is simply another attempt to prevent the Federal Commission's exercise of its power to regulate within the confines of its jurisdiction according to its own judgment by reference to costs and charges, and without reliance upon opinions as to values." 206 F. 2d at 704.

The Kansas Commission's petition for certiorari was denied by this Court on January 4, 1954. 346 U. S. 922. Its petition for rehearing was denied on June 7, 1954, the very day of this Court's decision in the *Phillips* case. 347 U. S. 1022. The question whether a state minimum price regulation has any proper place in the determination of rates subject to the jurisdiction of the Federal Power Commission was thus before the Court when it decided the *Phillips* case. While denial of certiorari of course implies no decision regarding the merits of the case, it is a fair inference that this Court considered the *Northern Natural* case in connection with the *Phillips* case and did not regard their respective dispositions as inconsistent.

In sum, Congress granted to one agency, the Federal Power Commission, full authority to regulate gas sales by independent producers to interstate pipeline companies. The Natural Gas Act establishes a comprehensive regulatory system. The Commission, not some state agency, is to determine what rates are "just and reasonable." The Commission, not the Corporation Commission of Oklahoma, is to determine when and whether Panoma or its successor may cease its present service to Natural. It is unnecessary to examine at large the permissible scope of state gas and oil conservation measures. It is enough for present purposes that the specific measures here involved

—the orders of the state commission fixing minimum prices for sales over which the Federal Power Commission has jurisdiction—were beyond the state's power.

C. Oklahoma's Minimum Price Regulations Are Contrary to the Dictates of the Commerce Clause.

1. State Regulation of the Sales Here Involved Is Inconsistent With the National Interest in the Free Flow of Natural Gas in Interstate Commerce.

Discussion thus far has focused on the evident conflict between attempted state regulation of interstate sales of natural gas for resale and the jurisdiction of the Federal Power Commission to regulate the same sales. In addition to the fact that two independent agencies cannot each fix the price of the same sale, however, is the further fact that the state commission has here attempted to regulate a transaction in interstate commerce in which the national interest is paramount. For that reason also the state commission's orders must fail.

When the residue gas here involved is purchased by Natural at the mouth of its interstate pipeline the raw natural gas of which it was originally a constituent has been produced, gathered and processed through a gasoline plant. The liquefiable constituents have been separated and sold, and the residue has been made to conform to the standards of purity and quality required for the interstate transportation of such gas and for its utilization by the ultimate consumer. Natural makes no sales in Oklahoma; the residue gas is purchased only for transportation to markets in other states. It can go nowhere else, physically or contractually. The delivery of that gas, coincident with its sale, into Natural's pipeline is a movement in interstate commerce, and "is essentially a part of interstate commerce itself." *Michigan-Wisconsin Pipe Line Co.* v.

Calvert, 347 U. S. 157, 167. For the same reason the sale itself is an integral part of interstate commerce.

Any regulation of sales of a commodity made under such circumstances vitally affects the interests of those who live in the consuming states and provide an outlet for the commodity, thereby giving it a value, as well as the interest of those who produce the commodity. If it is in the public interest that prices in such transactions be regulated by the states of production, affirmative authority therefor must be obtained from Congress, which can consider the matter with impartial regard for the interest of *all* the states—the consuming states as well as the producing states. *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 59, 61; *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189, 202.[13]

In *Superior Oil Company* v. *Mississippi*, 280 U. S. 390, 396, this Court, through Mr. Justice Holmes, emphasized the significance of "dramatic circumstances" such as a great universal stream of a commodity from the state of production to markets in other states in determining whether state action is violative of the Commerce Clause. The flow of natural gas from the producing states to markets throughout the nation has long been recognized as involving just such dramatic circumstances. This has, of course, resulted in a great national interest in the interstate sales of the gas involved in that movement as was pointed out in *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, 692-3, as follows:

> "* * * We have held that these sales are in interstate commerce. *It cannot be doubted that their regulation is predominantly a matter of national, as contrasted to local concern.* All gas sold in these transactions

[13] Congress has authorized state regulation of interstate activities when it has considered such regulation to be in the public interest. For illustrations for such authorizations see *United States* v. *Public Utilities Commission*, 345 U. S. 295, 304 (footnote 9).

> is destined for consumption in States other than Louisiana. Unreasonable charges exacted at this stage of the interstate movement become perpetuated in large part in fixed items of costs which must be covered by rates charged subsequent purchasers of the gas, including the ultimate consumer. It was to avoid such situations that the Natural Gas Act was passed."

The national interest in the sales here involved is thus clear. So far as the state's interest in regulating such sales is concerned, however, the Court will readily discover that Oklahoma's interest in "economic conservation," which is the chief theoretical basis for the setting of minimum prices, is simply a polite euphemism for the theory that consumers of gas in other states should be required to pay local producers prices in excess of those arrived at at arm's length because some so-called "competitive fuels" sell at higher wholesale prices than natural gas in the consuming markets of the nation.[14] The purpose of fixing minima for sales of gas, in other words, is to assure producers of gas in the Guyman-Hugoton field of Oklahoma that they will receive the maximum for their gas consistent with maintaining the competitive position of natural gas *vis-a-vis* other fuels—in short, whatever the traffic will bear.

This position was very frankly stated by one of the principal witnesses introduced by proponents of the state commission's orders:

"Q. If we first assume that the State of Oklahoma

[14] The principal justification for the increase in the minimum price of gas from 7 cents to 9.8262 cents per Mcf was that the comparative wholesale prices of coal, crude oil, kerosene, gasoline and butane, on the basis of B.T.U. content, were greater in Chicago and other consuming markets than the price of natural gas, and that consumers of gas were not therefore paying as much for the gas as it was worth in comparison with other fuels. (321R. 26) On the basis of this comparison, the witness testified that the price of gas ought to be 25 or 30 cents per Mcf. (321R. 49-50)

has an interest in preserving natural resources or seeing that they are—the state and its citizens realize its value therefor, if it can be prevented, what action do you think the state ought to take to prevent sales of gas from that field for less than 9.8262 cents?

"A. I think to protect the interests of the State of Oklahoma and its citizens that the Commission ought to use such powers as it has to provide a price for gas produced in Oklahoma *that will produce the maximum revenues consistent with the policy of maintaining markets.*" (321R. 57)

* * * * *

"Q. Mr. Biddison, in what manner would the owners, producers of that gas, be adversely affected if any, by an increase in the wellhead price of that field? Do you visualize any manner in which detriment will occur to the State of Oklahoma or to the citizens of Oklahoma by the increase in this lower price?

"A. I can see only advantages to it.

"Q. Then the Commission having authority to set a price, do you know of any reason why they should not do so?

"A. I do not." (321R. 58-59)

It was upon considerations of this kind that the Corporation Commission of Oklahoma proceeded to burden the out-of-state consumers of gas served by Natural's pipeline alone with additional costs of $1,108,505 annually, an increase of 57% over the contract price. Of course this windfall is advantageous to Panoma and other gas producers and royalty owners in Oklahoma. But it was the purpose of the Commerce Clause to prevent just such local preferments at the expense of the free and unfettered flow of interstate commerce. According to Mr. Justice Story, prior to adoption of the Constitution

"* * * each State would legislate according to its own interest, the importance of its own products, and the local advantages or disadvantages of its position in a

political or commercial view." Story, *The Constitution*, Sec. 259.

This came "to threaten at once the peace and safety of the union." *Id.*, Sec. 260.

The Commerce Clause put an end to such narrow parochialism. That it should be revived in an industry as important and far-flung as that of supplying natural gas to homes and industries throughout the nation presents a threat to national unity that should not be minimized.

Finally, in weighing the respective national and local interests in the regulation of sales of natural gas in interstate commerce, the very fact of enactment of the Natural Gas Act, quite apart from the conflict between state and federal regulation resulting therefrom, is conclusive evidence of the paramount national interest. *Illinois Natural Gas Co.* v. *Central Illinois Co.*, 314 U. S. 498, 506.

Since by the orders here involved the state commission has invaded a field which, under the Commerce Clause, is reserved exclusively to federal control, the orders are invalid.

2. Oklahoma's Minimum Price Regulations Are Aimed at and Discriminate Against Interstate Commerce.

Most important and significant is the fact that, in addition to casting a heavy burden on interstate commerce, Oklahoma's minimum price regulations are specifically aimed at, and discriminate against, interstate commerce.

Oklahoma's minimum price regulations apply only in the so-called Guymon-Hugoton field, located in the western panhandle region of the State. (321R. 129) Of the gas produced in that field, 89% is transported interstate, while approximately 11% is consumed or stored in Oklahoma. Other fields in Oklahoma produce nearly twice as much

gas as that produced in the Guymon-Hugoton field. Of the gas produced in those fields, however, more than 85% is consumed or stored within Oklahoma and less than 15% transported to other states—almost precisely the inverse ratio of that prevailing in the Guymon-Hugoton field. (321R. 283)

One would suppose that, if minimum prices were necessary to "prevent waste" and "promote conservation" in the Guymon-Hugoton field, such regulation would be equally appropriate in the other fields producing the greater part of the State's supply. Indeed, prices in those fields are in many instances far less than 9.8262 cents (321R. 66, 39) The state commission has never bothered to explain why, if the taking of natural gas from the Guymon-Hugoton field at less than 9.8262 cents causes "economic waste," physical waste, loss to royalty owners, loss of taxes to the State, inequitable taking from a common reservoir, and discrimination among producers (321R. 134), the taking of gas at far lower prices in other fields does not result in similar disadvantages.

The answer, of course, lies in the relative percentages of Oklahoma-produced gas which is consumed within the State. In a field like Guymon-Hugoton, where 90% of the gas is transported to markets in other states, there is little to deter the state commission from raising the minimum prices to whatever figure "will produce the maximum revenues consistent with a policy of maintaining markets," as proponents' witness recommended. (321R. 57) In such cases the voice of the out-of-state consumer is faint and far off.

Where 85% of the gas is consumed within the State, however, as is true of the production from the other fields, quite different considerations prevail. There, the voice of the local consumer is heard and his interests furthered. The royalty owners who seek increases in gas prices merely

because "they are very unhappy" with present prices (321R. 66) are offset to some extent by the local consumers who are equally unhappy at having their gas bills increased.

The state commission resolved this problem by the simple expedient of setting minimum prices in the one field from which nearly all of the gas is shipped interstate, while permitting arms-length prices to remain in effect in the fields which supply gas principally for consumption in Oklahoma. But the very basis of this expedient condemns it under the Commerce Clause. This Court in *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177 put the matter thus:

> "State regulations affecting interstate commerce, whose purpose or effect is to gain for those within the state an advantage at the expense of those without, or to burden those out of the state without any corresponding advantage to those within, have been thought to impinge upon the constitutional prohibition even though Congress has not acted. * * * [Citations]
>
> "Underlying the stated rule has been the thought, often expressed in judicial opinion, that when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state. * * * [Citations]" 303 U. S. at 184-5 (footnote).[15]

This Court has been particularly alert to the possibility that a state statute or regulation results in discrimination against interstate commerce, "whether forthright or in-

[15] Cf. *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U. S. 422, 433-4.

genious." *Best & Co.* v. *Maxwell*, 311 U. S. 454, 455.[16] And it is immaterial that intrastate commerce is subject to the same proscription as that moving interstate. *Dean Milk Co.* v. *City of Madison*, 340 U. S. 349, 354. Determination of discrimination is not dependent upon legislative declarations of purpose but upon the practical effect of the state's action on interstate commerce. *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1, 10.

The discrimination against interstate commerce comes into existence in this case because of the fact that the citizens of Oklahoma City and Tulsa are not affected by, and thus have no interest in, increases in minimum prices fixed for sales in the Guymon-Hugoton field like that of the citizens of Chicago and Detroit. Thus, when a witness supporting increased prices in that field testified that the interests of Oklahoma and its citizens lies in prices that will produce the maximum possible revenues to producers (321R. 57), no representative of consumer interests in Oklahoma arose to say the contrary. In short, there were present none of the "political restrictions which are normally exerted in legislation where it affects adversely some interests within the state." *South Carolina Highway Department* v. *Barnwell Bros.*, 303 U. S. 177 at 185. Discrimination against interstate commerce, real and potent, alone makes the state commission's orders void under the Commerce Clause.

[16] The Court will recall that the state "gathering tax" involved in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, had been so drafted as to "tax the pipeline gas that goes out of the State of Texas and give as much protection as possible to Texas industries." See Joint Brief of Appellants in Nos. 198, 199, 200 and 201, 1953 Term, pp. 20-21.

3. The Cities Service Case Does Not Support the State Commission's Action.

In the court below appellees relied upon *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179, as support for the state commission's attempt to fix minimum prices for the sales here in question. This Court did not there consider the effect of possible conflict with federal authority by virtue of the Natural Gas Act, as it was required to do in the *Phillips* case. Nor was it presented with a showing of discrimination against interstate commerce such as that just discussed. 340 U. S. at 188-9.

It is equally clear, moreover, that this Court did not consider or decide the question whether, under the Commerce Clause alone, the state commission could regulate sales of the kind here involved even absent discrimination against interstate commerce. The sales involved in the *Cities Service* case were wellhead sales—sales of raw gas made on the producing properties immediately following production. Subsequent to that purchase, the raw gas was gathered by the purchaser, Cities Service, together with gas from many other wells, to a gasoline plant of an affiliated company, where the gas was processed for the extraction of liquids. Thereupon Cities Service moved the residue gas to its depot or concentration point near Blackwell, Oklahoma, where it was commingled with gas from other Oklahoma fields. Afterwards a portion of the commingled gas was transported by Cities Service to certain of its Oklahoma markets and the remainder to its markets in other states.[17] Thus, while most of the gas involved in the *Cities Service* case ultimately found its way interstate, it did so only after substantial gathering, processing and commingling operations had been performed in Oklahoma subsequent to the purchase of the raw gas at the wellhead.

[17] See record in *Cities Service* case, Nos. 73 and 153, October Term 1950, pp. 462-3.

This Court did not therefore, consider or decide whether a state has power to regulate sales of residue gas made at the very mouth of an interstate pipeline after gathering and processing have been completed and the interstate journey has actually begun. This is emphasized by the Court's reliance on *Parker* v. *Brown*, 317 U. S. 341, a case in which a state raisin proration program was upheld under the Commerce Clause, even though 95% of the product ultimately found its way into interstate commerce, on the ground that the restrictions were imposed

> "* * * upon the sale within the state of a commodity by its producer to a processor who contemplates doing, and in fact does work upon the commodity before packing and shipping it in interstate commerce * * *" 317 U. S. at 359.

The *Cities Service* case presented a somewhat similar situation: local regulation of the sale of a product *prior* to gathering, processing and shipment in interstate commerce. At that time the gas was not suitable for interstate transportation or for consumption without subsequent processing and dehydration. This Court was therefore very careful to limit its decision, stating: "We hold on this record the Oklahoma Corporation Commission issued valid orders * * *." The present sales, on the other hand, are made after those operations have been completed and the residue gas has actually started its interstate movement. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 156 at 168-9.[18]

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[18] In its decision in *Wisconsin* v. *Federal Power Commission*, 205 F. 2d 706, affirmed by this Court's decision in the *Phillips* case, the Court of Appeals for the District of Columbia also pointed out this distinction as follows:

> "Since Phillips' sales are made after the gas has been gathered into trunk lines *Cities Service Gas Co.* v. *Peerless Gas & Oil Co.*, 1950, 340 U. S. 179, * * * is irrelevant." 205 F. 2d at 710 (note 9).

Any attempted reliance by appellees on *Phillips Petroleum Co.* v. *Oklahoma*, 340 U. S. 190, a companion case to *Cities Service*, is likewise misplaced. As this Court made clear, appellant did not there argue that the state commission's orders violated the Commerce Clause but contended only that the orders were vague and lacked reasonable relation to their purported basis. 340 U. S. at 192.

D. The State Court's Attempts to Rewrite the Gas Purchase Contracts Cannot Be Sustained.

In what can only be characterized as an attempt to evade this Court's decisions construing the Natural Gas Act and the Commerce Clause, the Supreme Court of Oklahoma purported to construe the gas purchase contracts here involved as providing, not for sales of residue gas at the outlets of gasoline plants after production, gathering and processing have been completed, but for sales of the residue constituent of the gas while it is still a part of the raw natural gas in the underground formations—prior even to production of the gas. While appellees have never attempted to defend this rationalization, brief comment seems appropriate.

In its opinion in No. 191, the state court stated its theory as follows:

> "These contract provisions tend strongly to support the Commission's findings, and to indicate that in truth and in fact Natural bought and contracted to buy all of Panoma's natural gas in the ground and to be produced from under this 78,000 acres, and that all provisions for drilling, producing, piping, compressing, processing, metering, etc., were merely details of delivery to Natural of that which it had already bought." (191R. 160)

And in its subsequent opinion upholding the state commis-

sion's order in No. 321 the court reiterated that the transaction provided for in the gas purchase contracts

> "* * * amounts to a sale of residue gas in place; the sale is made before any movement of any kind starts and before anything in the nature of interstate commerce occurs, regardless of the acts required to be performed before the residue gas is separated from other constituents of the raw gas and regardless of the point of delivery to the purchaser." (321R. 176)

This startling theory is contrary to the undisputed facts, the construction of identical contracts by this Court, the Court of Appeals and the Federal Power Commission and is inconsistent with the orders of the state commission itself.

First, Natural's contract with Harrington & Marsh provided expressly that the latter would construct gathering lines and a gasoline plant, which they would operate, and that:

> "A metering station to be installed and operated by Natural * * * shall be located near the outlet of said plants *at which point title to the gas shall pass to Natural;* * * *" (191R. 103; 321R. 252)

In addition, other provisions of the contract demonstrate beyond any conceivable doubt that the gas was the property of the sellers until delivery of the residue at the outlet of the gasoline plant. For example, Harrington & Marsh agreed to

> "* * * do and perform all acts and things within reason which are necessary to continue in force, renew and maintain *their ownership of the gas reserves and their exclusive right to produce gas therefrom.*" (191R. 109; 321R. 258)[19]

[19] Panoma has never contended that Natural purchased gas in the ground. Its president testified that the meter station near the outlet of Panoma's gasoline plant is "our point of sale." He also stated that the commodity there sold was "obviously" residue gas. (191R. 34)

The state court's opinion in No. 321 is, of course, also applicable to Phillips' sales to Michigan-Wisconsin and Panhandle. With respect to Michigan-Wisconsin's operations, the parties, including the attorney for the state commission, had expressly stipulated:

> "* * * Phillips compresses and processed [*sic*] the raw gas produced from its wells in Oklahoma and Texas and the residue is then sold and delivered to Michigan-Wisconsin in Hansford County, Texas. *Title to the said gas so produced by Phillips does not pass into Michigan-Wisconsin until it is delivered at the meter of Michigan-Wisconsin in Hansford County, Texas.*" (321R. 143)

The plain language of the contracts and the express understanding of the parties are thus completely opposed to the novel theory evolved by the state court.

Second, it is significant that never during the course of the long litigation culminating in this Court's decision in the *Phillips* case did Phillips or any other party so much as suggest that it sold residue gas at any point other than at the outlet of its gasoline plant. The opinion of the Federal Power Commission, 10 F.P.C. 246, the opinion of the Court of Appeals, 205 F. 2d 706, and this Court's opinion, 347 U. S. 672, all construe Phillips' contracts with Michigan-Wisconsin and Panhandle Eastern, which are identical in all respects here material with Natural's contract with Harrington & Marsh, as sales at the outlets of gasoline plants. As this Court stated

> "After processing is completed, the gas flows from the processing plant through an outlet pipe, of varying lengths up to a few hundred feet, to a delivery point where the gas is sold and delivered to an interstate pipeline company." (347 U. S. at 675)[20]

[20] This same interpretation was given the same contracts in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157.

The one circumstance seized upon by the state court for its remarkable interpretation of the contracts was that Phillips and Panoma have "dedicated" the gas contained in certain of their leases to the fulfillment of their obligations under the contracts. Contract dedications are very common provisions which are required by the Federal Power Commission before it will authorize construction of a gas pipeline. (321R. 59) They constitute an assurance that the pipeline has an adequate gas supply by preventing a sale of the dedicated gas to other purchasers. It had never been suggested, prior to the Oklahoma court's decision in No. 191, that the dedication itself constituted a sale of residue gas in the ground. Cf. *Phillips* v. *Henderson Co.*, 101 Okla. 277, 225 Pac. 668, 671. This Court certainly did not so interpret the dedication provisions of the contracts before it in the *Phillips* case.

Third, if the state court's conclusion that the gas was actually sold in the ground were correct, the state commission's orders would not even apply to those sales. Its order in No. 321, for example, fixes the price for gas sold (a) at the wellhead, (b) during or upon conclusion of gathering and (c) after processing. The order thus does not purport to regulate sales in the ground. Indeed, if Natural and the other pipeline companies were really the owners of the gas in the ground prior to its production, it is *they* who would be in the position of producers.

Actually, of course, the state court's theories are so unrealistic as to be self-destroying. In such circumstances this Court will exercise its own judgment as to both the facts and the law. When the holdings of a state court rest on an interpretation of a contract, this Court will itself interpret the contract to see if the decision "rests on a fair or substantial basis." *Broad River Power Co.* v. *South Carolina*, 281 U. S. 537, 540. And, while this Court will be inclined to accept a reasonable interpretation of a

contract by a state court, that interpretation will be rejected if "manifestly wrong." *New York Transit Co.* v. *New York*, 303 U. S. 573, 593; *Southern Wisconsin Ry. Co.* v. *Madison*, 240 U. S. 457, 461. This case is a singularly appropriate one for application of that doctrine.

II.

THE STATE COMMISSION'S ORDER IN NO. 191 VIOLATES THE PRINCIPLES OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The state commission's order in No. 321 at least has the virtue of treating all pipeline companies which purchase residue gas produced in the Guymon-Hugoton field alike. Each is required to pay 9.8262 cents per Mcf. for residue gas at the outlet of its supplier's gasoline plant. The state commission's order in No. 191, which is directed solely against Natural, lacks even that virtue. By that order, Natural was directed to pay to Panoma a price substantially higher than that paid by other pipeline companies to their supplier, Phillips. This distinction, never explained or justified, creates an inequality of the kind condemned by the Equal Protection Clause of the Fourteenth Amendment.

When the state commission established its original wellhead price order of 7 cents per Mcf. in 1946, Phillips Petroleum Company intervened, requesting that the order be vacated or clarified as to it, since that company sells no gas at the wellhead but, instead, sells the liquid and residue constituents of the raw gas separately after conducting gathering and processing operations. The state commission denied this petition on the ground that Phillips was obtaining 7 cents for its gas because it was receiving from its sales of residue gas and liquid hydrocarbons *combined* a gross return which was the approximate equivalent of

7 cents per Mcf. "within the terms and meaning of Orders Nos. 19514 and 19515." (191R. 141)

Despite the fact that the state commission thus construed its original order as permitting the aggregation of receipts from liquid hydrocarbons and residue gas in the case of Phillips, it reached precisely the opposite conclusion in interpreting the same original wellhead order upon Panoma's application in No. 191. Natural there pointed out that, whereas Phillips was receiving only 4.67 cents for its residue gas and 2.81 cents for its liquids, a total of 6.98 cents per Mcf., Panoma was receiving 5.12 cents for its residue gas from Natural plus 4.18 cents from the liquid constituents (191R. 136), a total of 9.30 cents per Mcf. The state commission nevertheless held that Panoma's receipts from the liquid constituents should not be considered in determining whether it was realizing 7 cents per Mcf. and that Natural's payments for residue gas alone must equal the minimum wellhead price (191R. 86)

From the effective date of the original wellhead order, January 1, 1947, until it was superseded by the 9.8262 cent order effective August 1, 1952, therefore, Phillips Petroleum Company was held to have complied with the original order by receiving an aggregate of 6.98 cents per Mcf. from residue and liquid constituents of its natural gas, while Panoma was held to be violating the same order although its receipts aggregated 9.30 cents. Accordingly, while Panhandle Eastern Pipe Line Company was permitted by the state commission to pay only its contract price of 4.67 cents per Mcf. to Phillips because Phillips was receiving 2.81 cents for the liquids, Natural was ordered to pay 7 cents per Mcf. (an increase of 35% over its contract price) to Panoma, which received 4.81 cents in addition for its liquids.

The state commission's answer to Natural's contention

that it was not receiving equal treatment was simply that the commission's order with respect to Phillips was not intended to have general applicability; that

> "* * * this Commission does not feel it is bound herein by any determination of facts or any order entered therein; that this Commission is not required herein to vacate, modify or interpret Order No. 19702 [the Phillips order]." (191R. 85)

This is hardly an adequate explanation of an obvious discrimination in the treatment of companies whose operations are identical. There is here no question of different classifications, as to which the only issue is whether the classification is fairly related to the object of the regulation. *Railway Express Agency, Inc.* v. *New York*, 336 U. S. 106; cf. *Smith* v. *Cahoon*, 283 U. S. 553, 566-7. The state commission recognized that Phillips and Panoma carry on similar operations when it entered its order in No. 321, which applies equally to both. Why a distinction should have been drawn prior thereto is difficult to understand.

Since *Yick Wo* v. *Hopkins*, 118 U. S. 356, this Court has steadfastly held that when a state law or state regulation, fair on its face and impartial in appearance, is so applied as practically to make unjust and unreasonable distinctions between persons in similar circumstances, the denial of equal justice is within the prohibition of the Equal Protection Clause of the Fourteenth Amendment; that the purpose of the Equal Protection Clause is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute, or by its improper execution through duly constituted agents, *Sunday Lake Iron Co.* v. *Wakefield*, 247 U. S. 350, 352; that an actual discrimination in the application of a law "is as potential in creating a denial of equality of rights as a discrimination made by

law"; and that equal protection of the law may be denied by a state through the legislature, through the courts, or through its executive or administrative officers, in any of which events the action of the state violates the Equal Protection Clause of the Fourteenth Amendment, *Torrance* v. *Florida*, 188 U. S. 519, 521; *Rogers* v. *Alabama*, 192 U. S. 231. As stated by Judge Learned Hand in *East Coast Lumber Terminal* v. *Town of Babylon* (2nd Cir.), 174 F. 2d 106, 112:

> "It has indeed been the law for over sixty years [citing *Yick Wo* v. *Hopkins*] that the Amendment covers the unequal enforcement of valid laws, as well as any enforcement of invalid laws; * * *"

Here the fact of different treatment is admitted. Under the same minimum price order Panoma would receive substantially more than Phillips and Panhandle Eastern would pay substantially less than was required of Natural. No reason for the distinction can be shown. That the effect of this discrimination upon Natural has been substantial cannot be denied. This discrimination was recognized and removed for the future by the state commission's order involved in No. 321. Tested by the commands of the Equal Protection Clause, therefore, the state commission's order in No. 191 cannot be sustained.

CONCLUSION.

The orders of the state commission in Nos. 191 and 321 both involve attempted state regulation of interstate sales of natural gas for resale. As such they invade a field of exclusive federal jurisdiction under the Commerce Clause, particularly in view of the comprehensive system of federal regulation of the identical sales established by the Natural Gas Act. Furthermore, minimum price regulation in Oklahoma, which is confined to the one gas field

from which almost all of the gas goes interstate, is aimed at and discriminates against interstate commerce.

Finally, the state commission's order in No. 191, which plainly discriminated against Natural as compared with other pipeline companies, plainly contravenes the Equal Protection Clause of the Fourteenth Amendment.

The judgments of the Supreme Court of Oklahoma should be reversed.

Respectfully submitted,

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APPENDIX A.

Constitution of the United States of America.

Article I, Section 8:

The Congress shall have Power * * *
To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; * * *

Amendment XIV, Section 1:

* * * No State shall * * * deny to any person within its jurisdiction the equal protection of the laws.

The Natural Gas Act.

(52 Stat. 821; 15 U. S. C. § 717 *et seq.*)

Section 1 (15 U. S. C. § 717):

(a) As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local dis-

tribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Section 4 (15 U. S. C. § 717c):

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

* * * * *

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the

time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: * * *

* * * * *

Section 5 (15 U. S. C. § 717d):

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new

schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * *

Section 7 (15 U. S. C. § 717f):

* * * * *

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

* * * * *